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Supreme Court
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

DR. ELERY LAY, ET AL.,
*Petitioners,*

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The Petitioners Dr. Elery Lay, Rita Gloseclose, Thomas Hulse, and Katherine Reed[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 26, 1972, petition for rehearing denied on February 22, 1972. Upon granting of this petition, the Petitioners further respectfully pray that this Court summarily reverse the

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1. The Petitioners Gloseclose, Hulse and Reed are representatives of a class consisting of those duly registered voters in the City of Kingsport who voted for the Petitioner Dr. Elery Lay in May 1969 for a position on the Kingsport Board of Mayor and Aldermen (hereinafter referred to as "voter Petitioners").

judgment below with directions to reconvene a three-judge court to consider the merits of the Petitioners' constitutional claims. The decision below is so clearly out of line with applicable authority that oral argument is unnecessary in order to reverse and would be a wasteful expenditure of judicial energy.

The Respondents in this matter are the City of Kingsport, Tennessee, Charles K. Marsh, City Manager of the City of Kingsport, E. Lester Shelor, Recorder-Treasurer of the City of Kingsport, Dr. Ralph E. Evans, Superintendent of Schools of the City of Kingsport, John E. Faust, President of the Board of Education of the City of Kingsport, Winfield Dunn, Governor of the State of Tennessee and David M. Pack, Attorney General for the State of Tennessee, and all assistants and successors in office of those persons.

## OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Tennessee, Northeastern Division, granting the Petitioners' Motion for a Temporary Restraining Order and determining that the "issue between these parties is substantial", is attached hereto as Appendix C (page A9) and is not yet reported. The opinion and order of the United States District Court for the Eastern District of Tennessee, Northeastern Division (Three-Judge Court), dissolving itself on the grounds that the file presented no substantial federal claims is attached hereto as Appendix B (page A8) and is not yet reported. The opinion of the United States Court of Appeals

for the Sixth Circuit, which affirmed the order of the Three-Judge District Court, and the opinion of Circuit Judge McCree of that Court, concurring in part and dissenting in part, are reported in 454 F.2d 345 (6th Cir. 1972), and are attached hereto as Appendix A (page A1).

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 26, 1972. A timely petition for rehearing was denied on February 22, 1972, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

The Petitioners have challenged the constitutionality of certain Tennessee statutes and a Kingsport city ordinance which bar a person from contracting with or having any direct or indirect interest in any contract with a municipal corporation during the time that such person is an officer of or holds office under such municipal corporation. The question presented is:

Whether the Petitioners' claims that the provisions challenged, which effectively prohibit the Petitioner Lay from holding his duly elected public office and which thereby deny the voter Petitioners the right to be represented by the candidate of their choice, infringe in an impermissible manner upon the fundamental rights to freedom of expression and association guaranteed by the First Amendment and the guarantees of the Equal Protection Clause of the Fourteenth Amendment are so ob-

viously without merit or so foreclosed by previous decisions of this Court as to deny the Petitioners a hearing on the merits of those claims before a three-judge court?

## CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The principal constitutional provisions involved are the First, and Fourteenth Amendments to the Constitution of the United States.

The Tennessee statutes involved are the following:

T.C.A. 6-215. Restrictions on interest of officers.

> No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

T.C.A. 6-626. Contracts with officers prohibited.

> No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly.

T.C.A. 6-627. Liability of officer contracting.

> Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared

incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name.

The ordinance of the City of Kingsport, Tennessee, involved is the following:

Section 3, Article XX, Charter of Kingsport. Municipal officers, employees not to contract with city.

No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged.

## STATEMENT OF THE CASE

For many years, the Petitioner, Dr. Elery Lay, has been a teacher employed by the City of Kingsport through its Board of Education. For the past several years, the Petitioner Lay has served as Assistant Superintendent of Kingsport City Schools, which position pays an annual salary in excess of $13,000.

In May 1969, the Petitioner Lay was duly elected by the voter Petitioners to serve as a member of the Board of Mayor and Aldermen of the City of Kingsport by the largest electoral vote ever received by a candidate for that office. He was sworn in as Alderman on July 1, 1969 and currently serves as Alderman, which position pays an annual salary of $250.

Shortly after his election, the courts of Tennessee interpreted the statutes and city ordinance challenged by the Petitioners to bar the Petitioner Lay from contracting with the City of Kingsport for a salary as Assistant Superintendent of City Schools or in any other capacity. See Opinion of Tennessee Court of Appeals, R., .....; Complaint, Appendix in R., pp. 10a-11a. Subsequently, the Kingsport Board of Education offered to sign a contract with the Petitioner, conditioned upon and effective as of the date of his resignation as Alderman, which resignation had to occur prior to December 31, 1970 or his renewal contract as Assistant Superintendent of City Schools would not be available. See Affidavit, Appendix in R., pp. 20a-21a; Complaint, Appendix in R., pp. 11a-12a.

On December 29, 1970, a complaint challenging the constitutionality of these provisions as applied to the Petitioners was filed in the United States District Court for the Eastern District of Tennessee, Northeastern Division. See Appendix in R., pp. 4a-18a. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1343(3) and §1343(4). At the same time the Petitioners also filed a Motion for a Temporary Restraining Order to restrain certain of the Respondents from requiring the resignation of the Petitioner Lay as a member of the Kingsport Board of Mayor and Aldermen as a condition for his continuing to serve as Assistant Superintendent of Schools. See Appendix in R., p. 19a. On December 30, 1970, District Judge Neese entered an opinion and order granting the temporary restraining order, until further orders. See Appendix C, *infra*. Since that time the Petitioner Lay has

performed and continues to perform the duties of Assistant Superintendent of City Schools but without a contract and without compensation.

The Complaint prayed for the convening of a three-judge court pursuant to Sections 2281 and 2284 of Title 28 of the United States Code. On January 6, 1971, acting pursuant to a request by District Judge Neese, Chief Judge Phillips of the United States Court of Appeals for the Sixth Circuit designated three judges to hear and determine this action. Subsequently all of the Respondents filed Answers. See Appendix in R., pp. 27a-40a. On February 2, 1971, the District Court of three judges dissolved itself without a hearing and the benefit of briefs on the ground that the file presented no substantial federal claim requiring a hearing and determination by a three-judge court and remanded the action to the United States District Court for Eastern District of Tennessee, Northeastern Division, for further proceedings. See Appendix B, *infra*. On the same day, an order was entered in that district court revoking the previously granted temporary restraining order.

On February 10, 1971, the Petitioners filed a Notice of Appeal from the order of the Three-Judge Court dissolving itself. A hearing was held in the Court of Appeals for the Sixth Circuit on October 14, 1971; and on January 26, 1972, a judgment was entered affirming the order of the Three-Judge Court. See Appendix A, *infra*. The majority held that the State of Tennessee and the City of Kingsport could properly adopt the provisions in question for the purpose of preventing an individual from holding

public offices which would create a conflict of interest and that no purpose would be served by remanding the case to the Three-Judge Court for consideration of the Petitioners' claims. Circuit Judge McCree dissented stating that he would reverse and remand to the Three-Judge Court for a hearing on the merits of the constitutional claims. Judge McCree contends that the majority erroneously rendered a decision on the merits of the Petitioners' claims, rather than considering merely the threshold question of substantiality, which was the sole issue before the Court.

## REASONS FOR GRANTING THE WRIT

### 1. Both the Petitioner Lay and the Voter Petitioners Present Important Questions Not Settled by This Court.

The Petitioners challenge certain conflict-of-interest provisions which as interpreted by the courts of Tennessee effectively deny thousands of its citizens the right to participate in the political life of their communities at the most fundamental levels—those of seeking and holding public office and of effective exercise of franchise. Every person employed by a local municipality—from the high school civics teacher to the city garbageman—is effectively prevented from holding public office in that municipality by these provisions which require such persons to sacrifice the salaries of their regular livelihood for the nominal salary of public office. Such provisions have an equally severe impact on the voters of that municipality by substantially limiting the field of candidates from whom the voters might choose and as in this case by denying the voters the service of the candidate they duly elected.

The importance of such restrictions on the political activities of the public employee is accentuated by the continuous growth of all government with its vast number of regulatory, administrative and advisory agencies, and by the natural scarcity of qualified persons willing to serve as public officials, especially on the local level. The significance of this problem was well stated by the Supreme Court of California in striking down a similar restriction on the political activity of an employee of a municipal agency:

> "In summary we note that the expansion of government enterprise with its ever-increasing number of employees marks this area of the law a crucial one. As the number of persons employed by government and governmentally-assisted institutions continues to grow, the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it. Restriction on public employees which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which they require imperil the continued operation of our institutions of representative government." *Bagley* v. *Washington Township Hospital District,* 55 Cal. Rptr. 401, 421 P.2d 409, 417 (1966).

See also *Hobbs* v. *Thompson,* 448 F.2d 456, 471 (5th Cir. 1971).

The harmful effect of this type of restriction is particularly felt in smaller communities, where teachers, as a class, are often some of the most influential and knowledgeable citizens available for public service. See *Pickering* v. *Board of Education,* 391 U.S. 563, 571-72 (1968); *Mont-*

*gomery* v. *White*, 320 F.Supp. 303, 304 (E.D.Texas 1969). For example, no one doubts that Dr. Lay, having lived in Kingsport for many years and taught thousands of its citizens, would be a valuable public official of unquestionable integrity. Certainly his receiving the largest vote ever for his office is a tribute to the confidence of his fellow citizens. Yet his interest in serving and their confidence in him are totally frustrated by the provisions in question. Restrictions which deprive a community of the political participation and interests of persons such as Dr. Lay must be finely tailored to meet the specific state or municipal interest to justify such a violent intrusion on such fundamental freedoms.

That these provisions in question are not in any manner "finely tailored" is evidenced by the fact that their restrictions apply to far more individuals than public employees. In fact, it has been stated that if these provisions were ever enforced to the letter, the City of Kingsport would go out of business, as few individuals could afford or would be willing to serve in public office. Editorial, *Kingsport Times-News*, February 14, 1971, Appendix D, *infra*, p. A14. A literal interpretation would, it is suggested by that editorial, prohibit a person who owned stock in General Electric from serving in public office unless he sold his stock since the City buys light bulbs from that company. It is obvious that no effort has been made to tailor this legislation so as to consider the significance or the remoteness of the alleged conflict of interest.

Inherent in our system of representative government is the assumption that political expression and service

must be protected as the means of channeling conflict resolution into the political arena, thereby avoiding other destructive forms of conflict. Denying public office to thousands of well qualified individuals as well as denying to many more the opportunity to vote for a candidate of their choosing surely erodes this basic foundation of our system. These fundamental freedoms of seeking and holding public office and of exercising effective franchise must be protected from state restrictions other than those finely tailored to serve a compelling government interest.

This Court has often indicated the importance of closely scrutinizing state restrictions of this nature. See, *e.g., Dunn* v. *Blumstein,* 92 S.Ct. 995 (1972); *Bullock* v. *Carter,* 92 S.Ct. 849 (1972); *Turner* v. *Fouche,* 396 U.S. 346 (1970); *Williams* v. *Rhodes,* 393 U.S. 23 (1968). Yet no decision of this Court to date has involved the type of conflict-of-interest legislation imposed by the State of Tennessee and the City of Kingsport and it is of utmost importance that the extent to which a state may constitutionally legislate in this area be settled.

**2. Both the Petitioner Lay and the Voter Petitioners Present Substantial Federal Constitutional Questions Requiring a Hearing by a Three-Judge Court.**

The sole question before the Court below was whether the claims of the Petitioners present substantial federal constitutional questions requiring determination by a three-judge court.

This Court in *Ex Parte Poresky,* 290 U.S. 30, 32 (1933), established a two-pronged test for a court to follow in determing this question:

> "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

A court in applying this test may not permit its personal reactions as to the merits of the claims presented or the novelty of arguments presented it to enter into its decision, as the Court does not sit to determine whether the constitutional claims are good or bad on the merits. *Hargrave* v. *McKinney,* 413 F.2d 320, 328 (5th Cir. 1969). Cf., *Schneider* v. *Rusk,* 372 U.S. 224, 225 (1963). Therefore, where constitutional questions are presented which are "fairly open to debate", a hearing on the merits of those claims before a three-judge panel cannot be denied. 290 U.S. at 32.

As the minority opinion states, the majority in the Court below must have concluded that the Petitioners' claims were "obviously without merit", since their opinion cites no decisions of this Court concerning the constitutionality of state conflict-of-interest statutes. Appendix A, *infra,* p. A6. It is respectfully submitted that recent decisions of this Court which stress the importance of close constitutional scrutiny of state restrictions on the seeking and holding of public office and on the exercise of effective franchise preclude the possibility of the Petitioners' claims being frivolous or obviously without merit.

The First and the Fourteenth Amendments guarantee the right to seek and hold public office without overly broad

and invidiously discriminatory restrictions by a state or municipality. This Court has established that a person has:

> "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Turner* v. *Fouche,* 396 U.S. 346, 362-63 (1970).

The provisions challenged here arbitrarily act to deny the Petitioner Lay his right to hold public office, a right freely enjoyed by those who do not fall within the proscribed category. The fact that the provisions do not flatly bar the Petitioner Lay from the Kingsport Board of Mayor and Aldermen, but rather force him to surrender his regular livelihood as a condition of his public service makes the impediment no less real and no more constitutionally permissible.

Similarly, the First and the Fourteenth Amendments guarantee the right to cast an effective vote for the representative of one's choice unburdened by overly broad and invidiously discriminatory restrictions by a state or municipality. It is well settled by recent decisions of this Court that the right to exercise one's franchise includes the right to cast one's vote effectively; i.e., for the candidate of one's choice. *Dunn* v. *Blumstein,* 92 S.Ct. at 1000; *Bullock* v. *Carter,* 92 S.Ct. at 856; *Williams* v. *Rhodes,* 393 U.S. at 30; *Moore* v. *Ogilvie,* 394 U.S. 814, 818 (1969). Restrictions which limit the field of candidates from whom voters might choose are surely limitations on the right to cast one's vote effectively and must be closely scrutinized.

The effect of these restrictions, as those in *Bullock* were, is real and appreciable. A large segment of the community, including all teachers in the municipal school system, is effectively denied access to a place on the ballot, no matter how qualified they might be or no matter how broadly based their popular support is. By so denying them the opportunity to vote for candidates who represent their views these provisions in question have infringed severely upon the fundamental rights of the voter Petitioners.

Any abridgement of the fundamental rights to seek and hold public office and to exercise effective franchise must survive close constitutional scrutiny, and the state has a heavy burden of justifying by proof of a "compelling interest" any restraints on those precious rights. Recent decisions of this Court in the *Dunn* and *Bullock* cases clearly establish that the "compelling interest" test applies in testing the restrictions on the rights of the voter Petitioners. This Court has not yet addressed itself to the question of whether this strict standard of review must be applied in testing restrictions upon the right to hold public office, and declined specifically to make such a determination in *Turner* v. *Fouche, supra,* though holding there that "more finely tailored" means had to be adopted by the State. Yet surely it would be incongruous to apply one test when an action is brought by the potential candidate himself, and another test when the action is brought by voters seeking to vote for that same candidate. Moreover, in light of the recent *Dunn* and *Bullock* decisions applying the strict standard and indicating that "the rights of voters and the rights of candidates do not lend themselves to neat

separation", it seems clear that the strict standard should be applied.

In the present case, the provisions involved are unnecessarily and unreasonably broad in their attempt to achieve their purpose, and cannot survive the applicable standard of review, even if this Court were to apply that standard used in the *Turner* case. The only potential conflict noted by the majority in the Court below is that of the Petitioner Lay voting approval or disapproval of his own salary and such a conflict clearly can be handled by means more finely tailored than the total prohibition of persons, such as Dr. Lay, from holding public office.

Under these principles set forth by this Court, the Petitioners' claims cannot be said to be frivolous or obviously without merit. Indeed, the Court below did not specifically so hold, but concluded that "the State of Tennessee and the City of Kingsport may properly adopt statutes and ordinances for the purpose of preventing an individual from holding public offices which would create a conflict of interest". Appendix A, *infra,* p. A6. As the minority states, the effect of such a conclusion is to render a decision on the merits, and not on the jurisdictional question before the Court. Appendix A, *infra,* pp. A6-A7.

In support of their conclusion, the majority relies exclusively on *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and three other lower court decisions which the majority thought involved challenges "similar" to those of the Petitioners. That the majority below went beyond merely considering whether the constitutional questions before them were "obviously without merit" is evident from

the fact that in each of the three lower court decisions cited by the majority a three-judge panel *was* convened and heard the *merits* of those "similar" constitutional claims. See *Stack* v. *Adams,* 315 F.Supp. 1295 (N.D.Fla. 1970); *Deeb* v. *Adams,* 315 F.Supp. 1299 (N.D.Fla. 1970); *Wisconsin State Emp. Ass'n* v. *Wisconsin Natural Resources Board,* 298 F.Supp. 339 (W.D.Wis. 1969).

Moreover, even the *Mitchell* decision is not authority which would cause the Petitioners' claims to fail the substantiality test of *Poresky.* In *Mitchell,* this Court in a 4-3 decision upheld restrictions on certain political activities by federal officers and employees as set forth in the Hatch Act (5 U.S.C. §§ 7321-7327). That act, unlike the statutes and ordinances in question, is aimed only at active participation in partisan politics, and in fact expressly permits a covered employee to be an independent candidate in certain partisan elections, and all non-partisan elections. 5 U.S.C. § 7326. The Hatch Act deals narrowly with a Congressional interest in across-the-board "neutrality", which Congress balanced with the right to engage in political activity; whereas the provisions in question in dealing with potential conflicts of interest fail to accommodate in any way the fundamental right to engage in political activity. It is obvious that, unlike the Hatch Act and the *Mitchell* case which interprets it, no attempt has been made to tailor the legislation in question to infringe upon as few rights as possible. Such infringement where unnecessary and not achieved with narrow specificity raises substantial constitutional questions, none of which were involved in the *Mitchell* case.

In addition, the *Mitchell* case has no application whatsoever to those substantial constitutional rights of the voter Petitioners. The recent *Dunn* and *Bullock* decisions of this Court have explicitly recognized that the voters themselves have substantial rights to be protected apart from those with the candidate. The majority below totally ignores these separate and substantial rights, which in themselves present substantial questions for resolution by a three-judge court. The *Mitchell* decision certainly cannot be said to render those rights "obviously without merit."

Further evidence of the substantiality of the Petitioners' claims is the fact that three-judge panels have been convened and have heard almost identical challenges in other cases. In addition to the three cases cited by the majority below, three-judge panels heard similar claims in *Wilson* v. *Moore,* Civil Action No. 72-6-F (D.Ct.W.Va. 1972); and *Wetherington* v. *Adams,* 406 F.2d 724 (5th Cir. 1969). Moreover, despite the existence of *Mitchell,* three-judge courts have even heard the merits of challenges to the Hatch Act. See, e.g., *National Association of Letter Carriers, AFL-CIO, et al.* v. *United States Civil Service Commission,* Civil Action No. 577-71 (D.D.C. March 18, 1971); *Fishkin* v. *United States Civil Service Commission,* 309 F.Supp. 169 (D.D.C. 1969).

In failing to limit their decision to the jurisdictional issue of substantiality and remanding the case for a determination of the merits by a three-judge panel, the Court below has effectively foreclosed any possibility of the Petitioners formulating a record on the merits of their claims,

unless this Court deals with these issues now and summarily reverses the decision below. It is clear that the range of permissible restrictions on the fundamental rights of the Petitioners is a matter of degree and to render a sound decision on the merits a court must balance the state's and municipality's interests and the fundamental freedoms of its citizens. Thus, the ability of the Petitioners to introduce evidence as to the extent of those interests is critical. For example, in a trial on the merits, since the Petitioner Lay has continued to serve in a dual capacity (although receiving no salary as Assistant Superintendent of Schools) for the past two years, statistics with respect to the number of actual conflicts which have arisen could be introduced, plus other evidence to demonstrate that other less drastic means exist which would fully protect the state's and municipality's interest. Unless this Court acts upon this petition, such evidence is effectively barred from presentation, thereby precluding the development of any record on the merits.

## CONCLUSION

For these reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit and that said judgment and opinion be summarily reversed with directions to reconvene the three-

judge court to consider the merits of the Petitioners' constitutional claims.

Respectfully submitted,

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## APPENDIX A

No. 71-1210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DR. ELERY LAY, ET AL.,
*Plaintiffs-Appellants,*
v.
CITY OF KINGSPORT, TENNESSEE, ET AL.,
*Defendants-Appellees.*

APPEAL from the United States District Court, Eastern District of Tennessee, Northeastern Division.

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Decided and Filed January 26, 1972.

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Before: MCCREE, BROOKS* and KENT, Circuit Judges.

KENT, Circuit Judge. This is an appeal from an order of a Three-Judge District Court, convened pursuant to the provisions of Title 28 U.S.C. §§ 2281 and 2284, dissolving itself on the ground that the suit in question presents no substantial Federal claim. The parties will be referred to as in the court below.

The order in question remanded the action to the United States District Court for the Eastern District of Tennessee, Northeastern Division for further proceedings. The plaintiffs are Dr. Elery Lay, Assistant Superintendent of Schools for the City of Kingsport, Tennessee, who is a duly elected Alderman for the City of Kingsport, Tennessee, and a class consisting of registered voters of the City of Kingsport, who in May, 1969, voted for Dr. Lay for Alderman.

*The concurrence of Judge Brooks, in this opinion, was received before his death, on December 30, 1971.

One of Dr. Lay's functions as Assistant Superintendent of Schools was the initial preparation of the annual school budget, including his salary as Assistant Superintendent. An Alderman for the City of Kingsport has the duty of voting approval or disapproval of the school budget, and also the duty of voting appropriation of public monies as required by the approved budget, including his own salary as Assistant Superintendent.

Shortly, after the election, at which Dr. Lay was elected as Alderman, the defendants instituted a declaratory judgment action in the Tennessee Courts to determine whether Dr. Lay could serve as both Alderman and Assistant Superintendent and receive salaries for services in each of such positions, in the light of the provisions of certain Tennessee Statutes[1] and an Ordinance[2] of the City

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1. *T.C.A. 6-215. Restrictions on interest of officers.*—

No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

"*T.C.A. 6-626. Contracts with officers prohibited.*—No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly."

"*T.C.A. 6-627. Liability of Officer contracting.*—Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name."

2. Code of Ordinances, Section 3, Article 20, of the City of Kingsport provides:

"Section 3, Article 20, Municipal officers, employees not to contract with the city.—No member of the board of mayor and alderman nor any officer or employee of the city shall be

of Kingsport. The Tennessee Court of Appeals, ..... Tenn. App. ....., 459 S.W.2d 786 (1970), determined that under the provisions of the applicable Statutes and Ordinance there was a conflict of interest which prevented Dr. Lay from receiving any salary as Assistant Superintendent so long as he held the office of Alderman. Thereafter, the plaintiffs instituted the present action seeking an injunction to prohibit the defendants from applying the above cited Statutes and Ordinance, as required by the decision of the Tennessee Court of Appeals. The plaintiffs claim that the application of such Statutes and Ordinance resulted in their being deprived of rights conferred upon them by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The first issue presented is whether the order of the Three-Judge District Court dissolving itself is appealable to this Court. We conclude that it is. The Supreme Court of the United States has said in *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968), at 352:

> "The resulting situation is similar, we think, to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court of Appeals, and not to this Court."

And again in *Mengelkoch* v. *Industrial Welfare Comm.*, 393 U.S. 83 (1968), at 83, 84:

> "Moreover, we have held that when, as here, a three-judge court dissolves itself for want of jurisdic-

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connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

> tion, an appeal lies to the appropriate Court of Appeals and not to this Court."

and see also, *Mayhue's Super Liquor Store, Inc.* v. *Meiklejohn,* 426 F.2d 142 (5th Cir., 1970).

Thus, it is incumbent upon this Court to determine whether the Three-Judge District Court was presented with a substantial Federal question. The test for determining this issue has been set forth by the Supreme Court of the United States in *Ex parte Poresky,* 290 U.S. 30, 32 (1933), as follows:

> "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

This test has been applied by this Court recently. *Protestants and Other Amer. United, etc.* v. *United States,* 435 F.2d 627 (6th Cir., 1970), *Jones* v. *Branigin,* 433 F.2d 576 (6th Cir., 1970).

If the State of Tennessee and the City of Kingsport had authority to adopt the "conflict of interest" provisions set forth in the cited Statutes and Ordinance then no substantial Federal question is presented. The leading case in this area is *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947), which brought before the Supreme Court the constitutionality of certain provisions of the "Hatch Act" (18 U.S.C. § 61H, as amended, 18 U.S.C. § 61o) which prohibits officers and employees of the Executive Branch, with exceptions, from taking an active part in political

campaigns or the management of political activity. The Court recognized that the Act included a measure of interference with the freedoms of the civil servants involved, but further concluded that the Constitutional Rights asserted are not absolutes, and stated at page 103:

> "Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

*Mitchell* has recently been followed by other Courts when challenges similar to the one at hand have been asserted. In *Stack* v. *Adams*, 315 F. Supp. 1295 (N.D.Fla. 1970), an attack was made on a Florida Statute which required the resignation from state public office by a candidate for United States Representative. The Court decided that the Statute was not in violation of the First Amendment to the Constitution of the United States but held it invalid for other reasons. To the same effect is *Deeb* v. *Adams*, 315 F.Supp. 1299 (N.D.Fla. 1970) and *Wisconsin State Emp. Ass'n* v. *Wisconsin Natural Resources Bd.*, 298 F.Supp. 339 (W.D. Wisc. 1969). The District Court for the Western District of Wisconsin stated at page 350:

> "We conclude that the relinquishment of the right to run for partisan political office can constitutionally be made a condition of public employment."

In accord with the authorities cited this Court concludes that the State of Tennessee and the City of Kingsport may properly adopt Statutes and Ordinances for the purpose of preventing an individual from holding public offices which would create a conflict of interest. Having reached this conclusion we are satisfied that no purpose would be served by remanding the case to the Three-Judge Court for reconsideration of the issue of the substantiality of the questions presented in the first instance.

The order of the Three-Judge District Court dissolving itself is affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part). I agree with the majority that the dissolution order of the three-judge court is properly appealable to this court and that it is appealable at this stage of the proceedings. However, I would reverse that order and remand for the reconvening of the three-judge court to hear appellants' constitutional claims. The test for determining whether a constitutional question is sufficiently substantial to warrant the convening of three judges was stated by the Supreme Court in *Ex parte Poresky*, 290 U.S. 30, 32 (1933):

> The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Since the majority cites no Supreme Court decision concerning the constitutionality of state conflict-of-interest statutes, the basis for its conclusion must be that the question presented here is "obviously without merit." Yet, the

majority finds it necessary to reason at some length by analogy to Hatch Act cases—including recent cases that, despite the controlling decision in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947) were considered by three-judge courts—in order to conclude that "no purpose would be served" by remanding this case for reconsideration by a three-judge court. It appears to me that the majority actually has rendered a decision on the merits of appellants' constitutional claims instead of considering merely the threshold question of substantiality, which is the only question presented to us in this appeal. The three-judge court gave no reasons for its determination that appellants' constitutional claims were insubstantial and cited only *Protestants and Other Americans United for Separation of Church and State* v. *United States*, 435 F.2d 627 (6th Cir. 1970), *cert. denied, sub nom. Protestants and Other Americans United for Separation of Church and State* v. *Donahey*, 403 U.S. 955 (1971), and *Jones* v. *Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied, sub nom. Jones* v. *Sullivan*, 401 U.S. 977 (1971), which are authority for only the proposition that a three-judge court is not properly convened if the constitutional question presented is insubstantial under the *Poresky* test. These cases did not discuss the considerations relevant to a determination that the constitutional claim is obviously without merit, nor did the court below state its reasons for so holding. Accordingly, I would remand with directions to reconvene the three-judge court either to consider the merits of appellants' constitutional claims or to explicate the reasons for its dissolution on the ground of insubstantiality.

## APPENDIX B

### Order

(Filed February 2, 1971)

This district court of three judges, having reviewed the file herein, is of the opinion that no substantial federal claim is presented requiring hearing and determination by such a court. *Cf. Protestants and Other Americans United for Separation of Church and State, et al.* v. *United States of America,* C. A. 6th (1970), ..... F. (2d) ....., ..... [decided and filed December 16, 1970]; *Jones* v. *Branigan,* C. A. 6th (1970), ..... F. (2d) ....., ..... [Decided and filed October 21, 1970].

The district court of three judges constituted herein therefore hereby is DISSOLVED, and this proceeding hereby is REMANDED to the United States District Court for the Eastern District of Tennessee, Northeastern Division, for further proceedings.

ENTER:

/s/ William E. Miller
(William E. Miller)
Circuit Judge

/s/ Robert L. Taylor
(Robert L. Taylor)
District Judge

/s/ C. G. Neese
(C. G. Neese)
District Judge

## APPENDIX C

### Memorandum Opinion and Order

(Filed December 30, 1970)

The plaintiffs seek an order to restrain temporarily the action of the defendants who are officers of the state of Tennessee in the enforcement or execution as to the plaintiff Dr. Elery Lay of T. C. A. §§ 6-215, 6-626, 6-627, for repugnance to the Constitution, First, Ninth, Fifth and Fourteenth Amendments. 28 U. S. C. §§ 2281, 2282, 2284 (3); Rule 65 (b), Federal Rules of Civil Procedure. The plaintiffs appeared before the Court through counsel on December 29, 1970, at which time all the defendants, except the defendants Honorable Buford Ellington, governor, and Honorable David M. Pack, attorney general, of the state of Tennessee, appeared specially through counsel. Counsel for the plaintiffs certified to the Court in writing the efforts which had been made to give the notice of such hearing to such unrepresented defendants. The plaintiffs, in a verified complaint, as well as through the affidavit of Dr. Lay, claim that immediate and irreparable damage, injury, loss or damage will result to Dr. Lay and his co-plaintiffs before all the adverse parties can be heard in opposition.

The plaintiffs allege that Dr. Lay is a duly elected and acting member of the board of mayor and aldermen of Kingsport, Tennessee and, by contract with the board of education of the City of Kingsport, Tennessee, the assistant superintendent of its schools; that they voted for Dr. Lay as a candidate for membership on such board of mayor and

aldermen and represent all members of that class of voters in such election, Rule 23, Federal Rules of Civil Procedure;. that Dr. Lay is being compelled by the defendant city's board of education to elect by December 31, 1970 whether he will continue to represent his coplaintiffs and the class they represent as such member of such board of mayor and aldermen, by declining a proffered contract as such city's assistant superintendent of schools, or resigning as such alderman and accepting such proffer of such contract; and, that it has been adjudicated by the Law Court, Kingsport, Sullivan County, Tennessee, as modified and affirmed by the Court of Appeals of Tennessee, Eastern Section, that, "• • • so long as Dr. Lay remains an Alderman he can not be paid by any sum as salary under any contract made with the Board of Education after the school year 1969-1970 • • •", *City of Kingsport, et al.*, appellees, v. *Dr. Elery A. Lay*, appellant, C. A. Tenn., opinion of June 15, 1970, certiorari denied Tennessee Supreme Court (1970).

In his supporting affidavit, Dr. Lay claims that, without the requested restraint, the plaintiffs will be damaged irreparably, in that should Dr. Lay elect to resign from his position as alderman, in the event he prevails herein, he would be barred from returning to that position without a special election or until the next general election, depriving his coplaintiffs of their right to be represented by an alderman of their electoral choice; whereas, should Dr. Lay elect to refuse the aforementioned proffered contract as assistant superintendent of schools, he will be irreparably damaged by the attendant loss of salary and the likelihood of his being replaced in such position, with an attendant loss of prestige as an educator.

The application of the plaintiffs for injunctive relief is addressed to the judicial discretion of the Court. *Deckert* v. *Independent Shares Corp.* (1940), 311 U.S. 282, 290, 61 S. Ct. 229, 85 L. Ed. 189, 195 (headnote 9). The purpose of the requested restraint is not to determine any controverted right but to prevent a threatened wrong or the doing of any act pending the final determination of the action, whereby rights may be threatened or endangered, *viz.*, to preserve the status quo. *Missouri-Kansas-Texas* v. *Brotherhood of Ry. & S. S. Clerks*, C. A. 7th (1951), 188 F. (2d) 302, 306 [5].

In this consideration, proper exercise of judicial discretion requires the weighing of the "* * * conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. * * * And it [the Court] will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon such payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. * * *" *Yakus* v. *United States* (1944), 321 U. S. 414, 440, 64 S. Ct. 660, 88 L. Ed. 834, 857 (headnote 16). "* * * When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion 'upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and

convenience generally.' * * *" *Perry* v. *Perry*, C. A. D. C. (1951), 190 F. (2d) 601, 602 [1]. It is serious error if the statutes complained of are unconstitutional as applied to Dr. Lay, and this Court has failed to grant preliminary restraint. The question before this Court now is, not whether the statutes complained of are constitutional or unconstitutional, but whether the showing of the plaintiffs has raised serious questions under the federal Constitution and Tennessee law and has disclosed that enforcement of the statutes, pending a final hearing, will inflict irreparable damages upon the plaintiffs. *Cf. Mayo* v. *Lakeland Highlands Canning Co.* (1940), 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774, 779 (headnote 1).

The issue between these parties is substantial and cannot be determined in advance of the trial of this action on its merits. Federal courts are reluctant to use the injunctive power to interfere with the conduct of state officers. But when there is a deprivation of constitutionally guaranteed rights, the duty of a federal court to exercise that power cannot be avoided. See *Dixon* v. *Alabama State Board of Education*, C. A. 5th (1961), 294 F. (2d) 150, certiorari denied (1961), 368 U. S. 930, 82 S. Ct. 368, 7 L. Ed. (2d) 193.

Applying these principles to the facts at hand, this Court, undertaking to balance the respective equities and probable damages to the plaintiffs and the defendants, is of the opinion that the potential harm to the plaintiffs is substantial and irreparable, if issuance of the restraint is erroneously withheld, while the potential harm to the de-

fendants is minimal, if the restraint should prove to be improvidently issued.

Accordingly, a temporary restraining order will issue enjoining, until further orders, each of the defendants, their agents, employees, subordinates, successors, and all persons in active concert with any of them, from enforcing and carrying into effect the mandate of the letter of December 1, 1970 of Dr. Ralph E. Evans, superintendent of schools of the defendant municipality, directed to the plaintiff Dr. Lay, in so far as same required Dr. Lay "* * * to elect either to continue in [his] office as Alderman or to accept an employment contract as Assistant Superintendent of Schools at the same salary but conditioned upon and effective as of the date of [his] resignation as a member of the [defendant City's] Board of Mayor and Aldermen * * *" by December 31, 1970: CONDITIONED on the plaintiffs' giving of security in the sum of ten thousand dollars ($10,000), for the payment of such costs and damages as may be incurred or suffered by any defendant who is found to have been wrongfully restrained. Rule 65 (c), Federal Rules of Civil Procedure.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

Issued December 30, 1970 at 11:19 o'clock, a. m.

## APPENDIX D

### Editorials

4-B KINGSPORT TIMES-NEWS Sunday, Feb. 14, 1971

### CITY'S CHICKENS HOME TO ROOST

When Kingsport's aldermen challenged Elery Lay's right to serve on the city council while holding an administrative school position, they let the genie out of the bottle.

They'll have a hard time getting it back.

"Conflict of interest" questions have now been raised about Alderman Boots Duke, whose company's window glass wound up in the new fire hall, and Bays Mountain Park commissioner Harry Steadman, whose company bid for and won the contract to build the park's nature interpretive center.

We have no reason to believe that either of these officials did anything he shouldn't have done—or that Dr. Lay will do anything he shouldn't do if he wins his lawsuit.

If the truth were known, the charges and countercharges are more probably the result of factionalism than any disinterested concern for legality.

It's no secret that Assistant Superintendent Lay is no hero to the board of education which answers to the board of aldermen. And for all his disclaimers, Alderman Lay is the darling of a group of people who would like to see a new broom at both Dobyns-Bennett and City Hall. Duke and Steadman just got caught in the crossfire.

But the questions have been asked, and they will have to be answered.

Says the city charter:

"No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

The trouble with that statute is that if it were ever enforced to the letter, the city would go out of business.

There was a time when Kingsport was so small that public officials were bound to be involved in private businesses with which the city dealt. And at a later date, we're told, the city's official family was cozy enough to pass around contracts without even the formality of bidding.

Those days, we feel sure, are long gone.

But if public officials were literally barred from having "any interest in any contract," an alderman who owned stock in General Electric might be breaking the law every time the city bought a light bulb.

Neither city nor state law on the subject was designed to exclude a whole class of citizens—neither the teaching profession nor the business community—from participation in government.

The real test of conflict, it seems to us, is whether an official is actually in a position to influence decisions affecting his private income—and does exercise that influence.

An absolute prohibition of any potential conflict could result in wholesale resignations from the city's boards and commissions.

The community would be better served, it seems to us, if office-holders were required to abstain from decisions affecting their private interests—and if public bodies met openly enough to insure that they did.